

February 23, 2007

Civil Division-Kent County (739-7641)

Ms. Anna Strimel  
536 Main Street  
Dover, DE 19904

**Re: Freedom of Information Act Complaint  
Against Town of Cheswold**

Dear Ms. Strimel:

On November 22, 2006, our Office received your complaint alleging that the Town of Cheswold ("the Town") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA"), by: (1) meeting on August 7, 2006 without prior notice to the public to discuss changing the basis for property tax assessments; and (2) meeting on November 13, 2006 to rescind "a prior resolution to forgive real estate taxes to elderly citizens if those citizens were exempt from Kent County taxes. This vote was taken without prior notice or posting." <sup>1</sup>

By letter dated December 5, 2006, our Office asked the Town to respond in writing to your complaint by December 15, 2006. By letter dated December 11, 2006 the Town Solicitor asked for an indefinite extension of time to respond because of his trial schedule.

By e-mail dated December 12, 2006, our Office advised the Town Solicitor: "In order to

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<sup>1</sup> You also allege various violations of the Town Charter but those issues are outside our jurisdiction under FOIA.

Ms. Julie Strimel  
February 23, 2007  
Page 2

consider your request for an extension of time, you must specify a date specific by which our Office can expect to receive the response."

By letter dated January 11, 2007 to the Town Solicitor, our Office advised: "To date, we have heard nothing back from you. If our Office does not receive a written response to the FOIA complaint by the close of business on January 16, 2007, then we will accept the facts as alleged by the complainant as true and issue a written determination based on those facts alone."

By letter dated January 16, 2007, the Town Solicitor requested an additional two weeks to respond to your complaint. By letter dated January 16, 2007, our Office advised: "Your request for an additional two-week extension of time is denied. The original response by the Town was due on December 15, 2006, and you have not provided our Office with a specific reason why we should delay our determination of this matter any longer."

Our Office received the Town's response by facsimile on January 19, 2007. By letter dated January 23, 2007, our Office requested additional information from the Town which we received on January 25 and 29, 2007.

The Town provided us with a copy of the agenda for the Council meeting on August 7, 2006 which listed under "Old Business," "Property Tax Assessment." According to the Town, however, "no action was taken concerning real estate taxes in August 2006." The Town denies that at the November 13, 2006 meeting the Council rescinded a prior resolution to exempt real estate taxes for the elderly. According to the Town, "the only action taken was to exempt (8) individual properties. Therefore, there was no change concerning the exemption process."

#### **RELEVANT STATUTES**

FOIA requires public bodies to "give public notice of their regular meetings and of their

intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, . . . and the dates, times and places of such meetings." 29 *Del. C.* §10004(e)(2).

FOIA defines an "agenda" as "a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific grounds therefor . . . ." *Id.* §10002(a).

FOIA requires every public body to "maintain minutes of all meetings, including executive sessions, . . . Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon." *Id.* §10004(f).

### **LEGAL AUTHORITY**

#### **A. August 7, 2006 Meeting**

The Town provided us with the agenda and minutes of the Council's August 7, 2006 meeting. The agenda listed for discussion under "Old Business," "Property Tax Assessment."

The minutes of the August 7, 2006 meeting reflect that "Mayor Tinari gave an overview of the tax situation. [Councilman] Campbell motioned to set aside the resolution dated 07/05 for the tax year 2006/2007 and stay with Kent County assessments seconded by [Councilman] Sine. Motion passed 3-1. [Councilman] Diakos opposed."

The Town provided us with a copy of the July 2005 resolution "to assess all new construction at its purchase price which will be its market value." At the meeting on August 7, 2006, the Town Council set aside that resolution and voted to base the local property tax, not on the purchase price,

but rather on the property tax assessments by the county. The record belies the Town's contention that at the August 7, 2006 meeting the "Council did not make any change to the collection of taxes concerning real estate."

The agenda for the August 7, 2006 meeting of the Town Council listed for discussion "Property Tax Assessment." We do not believe that the agenda sufficiently alerted the public that the Council would discuss changing the basis for property tax assessments as listed under "Old Business."

"'An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.'" *Att'y Gen. Op.* 05-IB11 (Apr. 11, 2005) (quoting *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att'y Gen. Op.* 97-IB20 (Oct. 20, 1997))).

"While the statute only requires a 'general statement' of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfied neither the spirit nor the letter of the Freedom of Information Act to state the subject in such generalities as to fail to draw the public's attention to the fact that that specific important subject will be treated." *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at p.5 (Del. Ch., Aug. 29, 1986) (Allen, C.). See *Att'y Gen. Op.* 05-IB05 (Feb. 22, 2005) (listing "Town Solicitor" in the agenda was not "sufficient to inform the public that the Council would consider and vote on firing the Town's legal counsel"); *Att'y Gen. Op.* 02-IB20 (Aug. 30, 2002) ("Town Charter Changes" listed in the agenda "did not sufficiently alert the public that the Town would consider and vote to restrict voter eligibility").

Most recently, in *Att'y Gen. Op.* 07-ID01 (Jan. 25, 2007), our Office determined that listing

"Wastewater" in the agenda did not "sufficiently alert the public that the Town Council would consider and vote whether to privatize the Town's wastewater treatment plant and to decide which of two contractors to engage in contract negotiations."

We determine that the Town violated FOIA by failing to give the public adequate notice in the agenda for the August 7, 2006 meeting that the Council would discuss and vote on changing the basis for property tax assessments under "Old Business." "If a matter of public business had been the subject of discussion at a previous public meeting and is to be discussed again, there is no reason why the public body cannot be more specific in the agenda." *Att'y Gen. Op.* 05-IB26 (Aug. 29, 2005).

B. November 13, 2006 Meeting

You allege that at a meeting on November 13, 2006, the "Council voted to rescind a prior resolution to forgive real estate taxes to elderly citizens if those citizens were exempt from Kent County taxes. This vote was taken without prior notice or posting."

The Town provided us with the agenda and minutes for the November 13, 2006 Council meeting. The minutes reflect that Councilman "Diakos wanted to amend the minutes of the meeting of October 2 to reflect a resolution re-instating a tax exemption for the elderly. No other councilperson could recall such a vote. A motion to amend the minutes of the October 2, 2006 meeting to reflect no exemptions for the elderly was made by [Councilman] Ziegenhorn and seconded by [Councilman] Campbell. Passed unanimously. A motion to accept the minutes as amended was made by [Councilman] Campbell and seconded by [Councilman] Ziegenhorn. Passed unanimously."

The record shows that the Town Council did not rescind a property tax exemption for the elderly at the meeting on November 13, 2006. Rather, the Council made clear – in amending the minutes of the October 2, 2006 meeting – that it had not reinstated a tax exemption for the elderly at its previous meeting. Under these circumstances, we do not believe that the Town violated the public notice requirements of FOIA by amending the minutes of a previous meeting to reflect what actually occurred, or did not occur, at that earlier meeting.

FOIA requires the minutes of a public meeting to include "a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon." 29 *Del. C.* §10004(f). Implicit in this mandate, a public body must prepare minutes which do "not misstate or omit what in fact happened." *Reeder v. Department of Insurance*, C.A. No. 1553-N, 2006 WL 510067, at p.15 (Del. Ch., Feb. 24, 2006) (Strine, V.C.). *See Peter v. Kaufman*, 38 S.W.2d 1062, 1065 (Mo. 1931) (a public body has "the power to correct the record of the proceedings had at a previous meeting so as to make the same speak the truth, especially so when the correction consists of supplying some omitted fact or action and is done, not to contradict or change the original record, but merely to have the record show, in accordance with the truth, that a certain action was taken or thing done which the original record fails to show.").

There is nothing in the minutes of the October 2, 2006 meeting to indicate that the Council resolved to restore a property tax exemption for the elderly. Only one Councilman (Diakos) seemed to recall such a resolution in his motion at the Council's meeting on November 13, 2006 to amend the minutes of the October 2 meeting. However, according to the minutes of the November 13, 2006 meeting, even Councilman Diakos joined in the unanimous "motion to amend the minutes of the October 2 meeting to reflect no exemption for the elderly was made."

Based on this factual record, we determine that the Council did not violate FOIA by failing to prepare accurate minutes of the October 2, 2006 meeting. When Councilman Diakos made a motion to amend the minutes of that meeting on November 13, 2006, the Council performed its lawful duty to amend the minutes of the October 2, 2006 meeting to make it clear that "no exemption for the elderly was made." This correction was not to contradict or change the original record, but rather to have the record accurately reflect what transpired – or did not transpire – at the previous meeting.

### **CONCLUSION**

For the foregoing reasons, we determine that the Town did not violate FOIA at the meeting on November 13, 2006 by amending the minutes of the October 2, 2006 meeting to accurately reflect that the Council did not resolve to reinstate a property tax exemption for the elderly. We determine that the Town violated the open meeting requirements of FOIA by failing to alert the public in the agenda for the August 7, 2006 meeting that the Council would discuss changing the basis for property tax assessments.

Ms. Julie Strimel  
February 23, 2007  
Page 8

As remediation, we direct the Town to schedule a meeting within thirty days of the date of this letter in strict compliance with the notice requirements of FOIA for new and substantial reconsideration of the Town Council's decision at the August 7, 2006 meeting "to set aside the resolution dated 07/05 for the tax year 2006/2007 and stay with Kent County assessments." The Town Solicitor is directed to report back to our Office in writing within ten days after remediation is completed.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED

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Lawrence W. Lewis, Esquire  
State Solicitor

cc: The Honorable Joseph R. Biden, III  
Attorney General

Richard S. Gebelein, Esquire  
Chief Deputy Attorney General

Keith R. Brady, Esquire  
Assistant State Solicitor

Ronald G. Poliquin, Esquire  
Town Solicitor



Ms. Julie Strimel  
February 23, 2007  
Page 9

Phillip G. Johnson  
Opinion Coordinator